WILTBANK

The three present menaces

1901

The Three Present Menaces:

THE GENERAL ISSUE
THE GENERAL VERDICT
PERSONAL JUSTICE

BY

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I.

The General Issue.

It is not a paradox but a clear truth, which has the closest relation to your conduct of your profession, that whilst the substance of your science is a body of intellectual labor, is learning of the highest order in other words, arranged and moulded into a scheme, the most important of your functions as a lawyer involves the use of that which is not law, in any sense, but only a method, applicable to every sphere of man, a method of presentation. In all intercourse in life there must be observed this art of presentation. It does not form a part of what is dealt in, but only the manner in which the substantial thing itself is produced to your view, that you may reach conclusions upon it. It is, as Selden said of Logic, "the means both of attaining to, and of regulating, the other sciences." (*Essay of Fleta,* 128.) If you are not a pleader you may be a sound lawyer in the mastery of the learning of the ages, but you lack the function or power which is necessary to your action as a practitioner and you must remain obscure in the ranks of your class and no more powerful than an intelligent layman. Pleading is not the law; is outside of the law; is not specially related to the law. Pleading, when correct, displays and emphasizes the law, which exists independently of its agency and can never be interpreted, enlarged, abated, or in any degree affected thereby. Pleading may be likened to the telescope which makes manifest the stars and other structures of our universe, whether of high origin or of man's hand. If you do not correctly employ this agency you can never make manifest the fixed and enlightening principles of the law

which illumine the highest plane of human development and you have no power as a practitioner. To practice you must plead. Everything in the administration of justice, where there is a contest, depends on pleading. And so far as it is employed in its association with the science of law, it has become a science in itself, a subsidiary science, a logic of special application, exercising faculties which are not often aroused in the study of law alone. All this you already know, and for the science it may be safely assumed that you feel the respect and admiration natural to a learned man in the contemplation of that form of intellectual power which has most attracted him. It is at this point that I wish to refer to the state of mind of some men as to pleading, and to the status of the science itself. You doubtless now also know enough of the history of the practice of the law to have measured the prejudice which has slowly undermined the reputation of what was a long while winning favor, and at length gained the respect and fear of the laity, and the reverent awe of the initiated. Pleading and special pleading have come to be discredited. In no court in England or America to-day could you frame the record in a cause in what Baron Parke would have pronounced the only proper form; and the achievement of a surrejoinder has for years been absolutely impossible. Yet a surrejoinder was well reached in Professor Minor's example for students (*Minor's Institutes IV,* 554-555), which is approved and reproduced to us by Perry (*Pleading, 227*). And Reeves abstracts from Mayn (634) the case of Aleyne de Newton's writ of annuity against the Abbot of Burton-upon-Trent, in which they went on to reply, rejoin and surrejoin (*II,221, Finlason,* 1869.) The *London Times* of nineteen years ago (October 8, 1881), shows the report of a committee appointed by the Chancellor, which recommends that cases be disposed of without pleadings of any nature (*Thayer, Evid.,* 367). Some scant respect is yet afforded what we call a general issue, but special pleading, or the gradual elimination by written altercation of matter not directly pertinent to the thing disputed, has been abandoned. Yet we are told that this means merely the accomplishment of an abandonment or disuse in form; that the abandonment or disuse of the sub-

stance or necessary habit of special pleading—a habit as essential as the habit of speech—has not been accomplished, and is impossible; and it is complained that the result has been waste of time in all manner of pleading *ore tenus*. The process which once went on in the chambers of the specialists like Sergeant Saunders, and thus prepared a cause for the judges to await them as they made the circuit, is now postponed till the trial opens, and most of the rulings at nisi prius upon offers of proof are rulings upon pleaders mutually debating at bar so as to reach an issue of fact. Our trials are vastly longer in consequence; and much of this would be avoided if the written pleadings were still precise, as of old. Your attention may be called to other considerations of the situation which are of greater weight.

Has it occurred to you in your reading to ask, what is the trend and significance of the alleged reforms in pleading? These have been said to be, the simplification of the method of proceeding and the securing of a wider or broader justice, so that scholasticism, which is cramping and ungenerous and exclusive of the many, may be dismissed, and the worthy litigant may have the benefit of the exhibition of all conceivable things that are to be shown in his behalf. We hear to-day of the benefit of the open door in international commerce. The object which many declare they discover in the alleged reforms is to secure to the unlearned the open door in the practice of the law, so that he may offer his untrained and honest brain for ministration at the bar of the court, and propound his various and unclassified suggestions as they bubble up in his worthy and self-respecting head, for estimate and appraisement by the Judge, as if they were of scientific value and thus worthy of estimation and appraisement. This is certainly the consequence which has been pointed at in the manner of pleading *ore tenus*. The expression—"General"—with many of us has magic: it signifies that which is beneficent, as the antithetic—"Special"—provokes a frown.

How are you to examine this state of things, and characterize it and decide whether it is good or bad? If you examine it historically you will find it to be a process which has gone on for all historic ages, and will go on while civili-

zation continues; if you correctly characterize it you will drop the word reform, and suppress adjectives of belittlement, and instead, call it a development. How you are to say that it is good, or is bad, I hope to show ere I close this paper. We will begin the examination by instantly showing certain elements of bad condition. The result of the new course has been the prevalence of two strongly marked features or circumstances of jurisprudence. They are, I admit, to-day two menaces to jurisprudence of which, I also admit, we must beware; and with these menaces must be reckoned a third which is neither a circumstance nor a feature, but a doctrine or informing spirit which has produced the change and now influences quite too deeply as I confess I think the administration of the law. The two menaces are the General Issue and the General Verdict, and the third menace is the doctrine of Personal Justice. Shall we fear these three?

The General Issue is a menace because it admits of retort, which is wild or loose retaliation, in the stead of answer, which is a pertinent and logical meeting of a proposition advanced.

Let us rest for a few moments on a discussion of pleading. One need not be anxious that the statement of demand should be defended from attack, whether the attack of those who decry procedure in the manner of the intelligent laity, a class represented by Bentham and Lieber, or of lawyers themselves who grow impatient over the scruples of Chitty or of Baron Parke. The scientific lawyer should concede at once that any form of statement will serve. The proper statutes of amendment save elaboration of this point. I do not think that a case can be indicated in which it has been determined that upon successful demurrer to a declaration or count a final judgment has gone in favor of defendant where any relevant fact has been alleged, and is insisted upon, however imperfectly. Besides which, the statement may be excluded from my disquisition, and must be regarded as not pleading, so far as the discussion and conclusions I have in view are concerned. It may, indeed, be argued technically that in no case is the statement a step in pleading, and this upon a line of reasoning which may as well be briefly sketched now.

Let us keep in mind certain basic or fundamental principles. What is the object of pleading? It is, immediately, to produce a question for dispute and resolution, in other words what is known as an issue upon which one stakes his case, and it is, mediately, to invoke a final adverse judgment. Pleading would never be entered upon unless a final adverse judgment was in view, and a final adverse judgment would never be reached without an issue, because an issue represents a contest between parties, and courts do not enter adverse judgment where there are no parties contending. What, then, is the final adverse judgment? It is the ascertainment and sanction of a status; in dower the status of widowhood, in partition the status of coparcenary, in assumpsit the status of contractual obligation, etc., etc. You will observe that a final adverse judgment is not the establishment of a status, if by that is meant the creation or setting up of a status, because the status has existed, but has been disputed, before the pleadings produced the issue by which one party affirmed and the other denied it. This final judgment is an ascertainment in the sense that it discloses, or recognizes, as it were, in the sense that it clears up, a status; and it is a sanction in the sense that it is the support, or power, or life, or the impregnability of the status as between the parties related to the cause: as between these the status is beyond attack and hence is the ground of writs or orders in the nature of vindication and execution. A jury finds certain facts and renders a verdict, we will say, for the plaintiff; on this verdict a court enters judgment; this judgment ascertains and sanctions a pre-existing status till then in dispute, and this ascertainment and sanction are beyond attack, and hence writs may issue upon it; accordingly we have writs of execution whereby the property of the party charged is held to answer by way of compensation of breach of the obligation or of violation of the status. In most cases this ascertainment of a status puts a litigant in position to act upon a right, which pending the contest his adversary has kept under. Now such a right must be founded in fact and in law; this one feels sure will not be questioned; a man's right of any kind must flow from his situation among, and relation to, other men, and must be

countenanced by the law of the land; but whilst this is so, it is not less clear that the ascertainment of a right by a court must result from a dispute of fact alone, or from a dispute of law alone, or from a dispute involving both. There is no pleading save where the dispute involves a fact or facts.

We will pause for a moment to take our bearings. It will be kept in mind that what we are determining is that the statement of demand may be declared to be no part of the pleading when the proposition is tested technically. To advance, then, take the case of the ascertainment by the court of a right founded necessarily in fact and in law, but disputed in respect of the law alone. There is thus shut out all doubt as to the fact. The statement of claim serves as the datum, or exhibit of a status in fact, which is agreed to by the demurrer; and the conclusion of law is the only object of the later controversy. Where there is no question of fact in the case there can be no contention after statement filed, save by way of demurrer; and a demurrer to a statement may be successful or unsuccessful; if successful, it merely blocks an advance *modo et forma* on the plaintiff's part. This does not ascertain a status or right, and hence the judgment is not final. But all pleading is the means to a final judgment, and hence in the case supposed the pleading has not yet begun. In order to dispose of this topic as a whole, let us assume the demurrer to be unsuccessful. What then? The defendant suffers under a judgment on the merits, or he has leave to plead over. If he pleads over, he must open the way to an issue of fact; whilst if he does not plead over, he loses by his own default and no issue arises upon the statement. In these several situations, you will observe, the statement is not in any sense a pleading, because not part of a contest as to fact. An argument pro and con upon a naked question of law, is not pleading in the technical sense of the common lawyer, whether written or merely oral; if written, it is a brief; if oral, it is that form of argument which is called pleading, just as an oration of Cicero's or the Declaration of Independence may be called pleading. They are pronounced to gain a point in principle.

This leads up to two suggestions, one of merely general interest as we pass on, the other of more weighty import;

the first being that these views of the statement of demand do not arise upon any other step in the pleading as known to the common law, and as known to us when still there were steps, that is to say, before the general issue was prescribed by statute, because upon plea pleaded to a statement of demand the facts at once become involved in the inquiry, and accordingly the framing of an issue is inaugurated and in due course, and so a final judgment may be looked for. Thus if the mutual altercation were to run to a plea, or to any stage beyond a plea, and a demurrer were filed thereto, a judgment thereon might well be final, because the effect of the demurrer might be the ascertainment of facts in favor of one or other of the parties, and the law would be applied to that state of fact according as the argument upon the demurrer resulted. Here would be the ascertainment by a court of a status founded in both law and fact. In speaking of a demurrer I always mean demurrer to the substance of pleading, never to the form; a demurrer to form is not worthy of the name, or of the long attention of any court.

The other suggestion of the two up to which we have led is, as I see the matter, that pleading advances upon assertions of fact, or denial of assertions, and never advances when questions of law only are raised; pleading stops upon the interposition of a demurrer. A demurrer is no plea. *Hainton* v. *Jeffreys,* 10 *Mod.* 280. We must, therefore, see that pleadings are designed for the marshalling of questions of fact, and it is my wish to remind you that these questions must be marshalled by special pleading in writing, as parts of the record, or by altercations in court by counsel at bar when they offer evidence under a general issue. The first-named process is in the control of learned men, who leave their offices in the course of the labor only to appeal now and then to the court on demurrer, and it reaches its result, the issue involved, before the jury is called; the second is a process which the jury witnesses, and which is directed by the Judge in ruling upon the offers of proof. One of these may be better than the other. No matter how this may be, each is a form of special pleading, and one or other form is as necessary to a judicial contest upon fact as is language itself.

It will now be understood why, for the purpose of this disquisition, I am not anxious to defend any form of statement of demand from attack whether of the superficial or of the respectable class of critics, and also that, whether or not technically it may be regarded as of the pleadings in a cause, I do not include the statement in the discussion and conclusions which I have in view. A good pleader asks if any part of a statement is sufficient in law; if it is, he does not deign to be interested in any other part. Paston, J., in *Y. B.* 19, *H.* 6, 50, 7, ruled that if a bill be good in substance it is enough; "car un bill n' ad aucu forme." This meant the petition, or statement, which 28 Edw. III, c. 8, speaks of indifferently as "a bill of trespass" and "a writ of trespass." I assume a statement or datum to be present, and thereupon I proceed to select two words, one of which shall signify alike the general issue and a line of special pleading, and the other of which shall signify all other forms of counter-statement—one of which shall signify accuracy and the other inaccuracy. The best words for this purpose are Answer and Retort: these have the sanction of etymology and of the precedents.

It is worth while to glance for a few minutes at the precedents for my use of the word *answer* as meaning a valid plea.

7 H. 4, folio 6. Debt by a Woman: Defendant pleads, That she is outlawed at the suit of J. S., and the plaintiff pleads No such Record and she was outlawed at the suit of N. S., and she shall not be *Answered,* for it is not material at whose suit she was outlawed. Kitchin on Courts, 4th edit., 464.

3 H. 6, folio 3. Debt against Executors: to plead Fully Administered and so Nothing in their Hands, is not double: for *one Answer* makes an end of all, that is that they have Assets. K. 448.

14 H. 4, folio 45. Trespass of his Servant taken the Defendant justifies for that the Father of him which is said to be Servant held of J. S. in Knight-Service, and that he died and the land descended to the Infant called Servant being within age, and that the Defendant by the commandment of the said J. S. seised him: the Plaintiff saith Of his own wrong without such cause: and by Cheney and Hull for

that, that the Defendant hath alleged Special matter, that is, Tenure by Knights Service, the Plaintiff ought to *answer* to the Special matter, and this is no plea. K. 447.

12 Edw. I, folio 10. If the Defendant justifie by License or Commandment of the Plaintiff, the Plaintiff shall not say Of his own Wrong without such cause, nor if parcel be of record, for these ought to be *answered* specially. K. 444.

2 H. 5, folio 1. Replegeare, the Defendant avows as Bayliff for that a Prior held of his Manor by Fealty and Rent, the Plaintiff saith, Of his own Wrong without such case: it is no Plea: for here he ought to *answer* the substance which is material, that is to say the Lordship. K. 443.

13 H. 7, folio 13. Trespass, the Defendant justifies for Common appendant and gives in Evidence that he hath Common by reason of Neighbourhood; it is not good, for it is not *answerable* to the matter in Issue. K. 241.

Y. B. Edw. II, 507. A woman claimed dower, alleging that her husband had endowed her *assensu patris,* and put forward a deed which showed the assent. The defendant traversed; some discussion followed as to how the issue was to be tried, and as to the effect of the deed. Counsel for defendant said, "The deed which you show effects nothing beyond entitling you to an *answer.*" Counsel for plaintiff, "True, but he can only have such issue as the deed requires." *Thayer, Evid.* I, 14.

Much at times depends upon definition, but definition only serves as a temporary anchorage; and one of the mistakes which John Austin made was to assume that it served once and forever, and that a decision or judgment must go in one way, because words depended on meant but one thing. We have learned otherwise, first in the Court of Chancery, in which at an early day it was ascertained that according to equity definitions did not define. Next, the Probate Courts administered relief in the solving of latent ambiguities. And finally the administration at law of the doctrine of the intent of the parties made the circuit complete. You recall the case of the I promise-never-to-pay-note. 2 *Atkyns,* 32. *Allan* v. *Mawson,* 4 *Camp.* 115. And in ~~*Piper* v. *the Trust Co.*~~, 140 *Pa. St.* ~~233~~, real estate legally passed under the description of money. We have learned to treat

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statutes, contracts, wills, even libels and jurats quite otherwise than as meaning what they say in order that we may secure the saying of what they mean. I need not enlarge upon this because I only want to add that just now a definition will serve us. It is Retort which I wish to define. Answer I have already described as a pertinent and logical meeting of a proposition advanced, and we will leave it there. Retort has been called by the French, A Twist Backward, or Back, a Return by a Twisting and Curving.

This intellectual twist is a disease at last, and we will examine the disease briefly by way of making and fostering a dislike for it. Answer, or legitimate pleading, may be general or special, and valuable in either case; but retort is general only and has no power to concentrate inquiry. In answer the issue is material ex necessitate: In retort it is more likely to be wide of the mark than material because it is chosen from the broad field of associate ideas and not from the narrow channel of logical sequence.

If you fail to see the answer, or abandon it in a spirit of sophistry, or eccentricity, or malevolence, or in ignorance, retort is sure to flourish, and the reason is that unless one of two disputants elects to remain silent there must always be a counterthrust. Retort is an intellectual parry; a parry is a diversion of an inquiry from its logical end. The availability of retort is much the greater. A plausible retort is oftener at hand than an answer that can be sustained, and accordingly the clients are oftener ready with it, especially women and the laity, than the profession. This is because they are not trained. It must be observed that retort provokes retort, and that then only the skilled can use it with success. When women and the laity fall to it they find disorder, contradiction, confusion, defeat. Consider how rarely the real or true cause is stated for any line of conduct. The laity may with reason wonder at the many points upon which cases are won; the victory they most frequently deprecate has involved the method of parry, although they mistakenly find it usually due to technicality, or what they call the vice of special pleading. Parry sometimes makes for truth, but much more often it is in perversion of truth. Special pleading has been discredited and thus has admitted

the efficacy of retort *ore tenus*. The law (as by a peculiar courtesy we call that which is not law) of contributory negligence in any common-law court,—for the doctrine of contributory negligence is only just in Admiralty,—is largely retort, or perverted answer. The defendant wins upon showing that while he was responsibly careless I was a trifle, and mainly an unimportant trifle, careless also; in most cases without damage to him,—mere kitchen dialectics.

These are light and kindly things to be said of retort, but they disclose the salient features of the disease and they show a bad thing. After all is said either way I am sure that there is one deep truth which illustrates the fundamental unanimity of lawyers, and that is, howsoever many men may detest the general issue, and again, howsoever many other men may abhor special pleading, yet they all unite in a contempt for retort.

I wish to illustrate this by reporting in my own way the case of *Myers* v. *Urich*, which arose in 1790, and is in the first of Binney 25.

James Kelly as assignee of Abraham Ebersoll procured a foreign attachment against one Myers, and attached moneys due on bond by one Urich to Myers. He got judgment against Myers in due course in August, 1790, and a *scire facias* issued against Urich the garnishee to August, 1791, whereon judgment was entered against Urich in the November next after.

Thus you see the debt was established in August, 1790; the assets were adjudged in November, 1791. No execution issued.

In the meanwhile Urich paid Kelly a large part of the amount due, and after the judgment of 1791 he paid him the balance. Thus you see the attaching creditor got the money, but without the cognizance of Myers, whose money it was.

The Act of Assembly of 1705, *An Act about Attachments*, 1 *Sm. Laws*, 45-46, had been disregarded by Urich. That act provided in effect that a garnishee was not compellable to pay in such case till bond had been furnished conditioned to answer to the garnishee's creditor if within a year and a day the latter should disprove or avoid the alleged indebtedness to the attaching party. This bond had not been required by, or given to, Urich.

Myers, therefore, in November Term, 1792, sued Urich for his debt; Urich *retorted* that he had paid: he said no more than payment, but craved leave to show the foreign attachment; this was the General Issue and Myers could only join; only at the trial could he first show that this had not been such a payment as was pleadable because not made upon execution or after bond procured. Proofs were taken, and it was seen that Urich had failed to *answer* and that his retort had in it no element of answer because it did not show that he had paid Myers or had been compelled by law to pay a stranger to the contract.

The efficacy of special pleading as above the general issue settled the case on review, in forcing the other side to throw up the brief: thus, said Duncan for Myers, if this point had proceeded on special plea I would not have been brought to court because a skilled pleader would have shown Urich in chambers that he had no case that could be validly pleaded, and there would have been a settlement on his advice or a speedy judgment; as it is this system of the General Issue, this idle word payment, has put us to a jury, the loss of time and the vexation, and then to an imposition upon the court in banc; for observe:

Our demand is shown; upon it a plea must be,—

a. That Urich paid for account of Myers.

b. That he paid under attachment in law. *Baker* v. *Hill*, 3 *Keble* 627.

c. That the Act of Assembly had been followed. *Scarpe* v. *Young*, *Lutw*. 985.

d. That pledges had been found. 1 *Brown* 162. *Dyer* 196, *pl*. 42.

e. And that execution had issued upon the judgment. *Spink* v. *Tenant*, 1 *Roll*. *Rep*. 105.

The defendant could prove none of these, and the case was nevertheless by the magic of that idle retort, Payment, carried to *nisi prius*, for the court in passing upon offers of proof to do the work which should have been done in the office of counsel. Thereupon said Ingersoll for Urich, I give up the cause.

Special pleading in this instance might have got Myers his money in November Term, 1792.

The general issue in this instance kept Myers out of his money till December 28, 1801, when our Supreme Court entered judgment, a tribute of nine years to the efficacy of Retort.

If, therefore, the general issue always led to retort, and your choice lay between special pleading and the general issue, it is apparent that you would be steady advocates of special pleading in order to escape the menace of retort. And so far as retort is let in by the general issue the latter is a menace, as I began by saying. We will leave it for a few moments, that we may turn to the general verdict.

II.

The General Verdict.

Of the verdict of a jury Burke wrote a remarkable sentence in his *Essay towards an Abridgment of the British History.* It contains a truth which has not been noted more than once or twice in any century of the life of the common law and which is rarely had in mind to-day. He was describing the jury of the time before Bracton. "They were," he said, "rather a sort of evidence than judges; and from hence is derived that singularity in our laws, that most of our judgments are given upon verdict, and not upon evidence, contrary to the laws of most other countries. Neither are our jurors bound, except by one particular statute, and in particular cases, to observe any positive testimony, but are at liberty to judge upon presumptions." *Vol. VI, 270. Edit. of* 1852.

The significance of this is startling, and its truth is shown in every respectable authority that is pertinent. Apart from the exercise of modern statutory functions, a common-law judge never finds facts, whilst, being arbiters of the fact, a jury at common law may find upon presumptions which it thinks the testimony warrants, but which you would say were in disregard of the testimony. Palpable error in disregarding the weight of the evidence is not corrected, but is punished by a common-law judge, who must therefore have first discerned the facts to be the other way, but who does not enter judgment; he sends the issue to another jury

and so dishonors its derelict predecessor. He thus violates the privilege of the jury. He dare not adjudge a state of fact, and he and his predecessors ever since our jurisprudence began have refused to do so. The law has nothing to do with the establishment of a status in fact among litigants; it makes the laymen, the citizens outside of the courts, do this and then it speaks. This and other things which may be said show you the narrow scope of the common law. It is an oracle to which litigants flock after they have made up the history to be passed upon in their struggle before twelve men of their own sort. And thus the people of the nation have a large part in the administration of justice. "Furthermore," says Professor Amos, "there is, no doubt, a scarcely conscious sentiment that the solemn act of awarding punishment demands the acquiescence of a representative body of the people as a whole; and that the jury, however casually chosen, forms such a representative body." (*The Science of Law,* Ch. X.) Only through the Church have the courts ever sanctioned a departure from this system and the usurpation of a power which never belonged to a judge non-pontifical. As the ecclesiastics, or judges pontifical as Selden called them, would not let their own class be tried for crime by the law courts, so in respect of the laity as well as of their own class they extended the wider protection of defying the law courts when they administered equity. Now these ecclesiastics and their successors are the only judges who ever found facts. Do you observe that this is wholly illegal? A chancellor finds facts and enters judgment upon them. And the common-law courts have submitted ever since the chancellor began the work, because, at first, the King, who was the fountain of the law, inspired the chancellor to declare what in conscience was right, and because afterwards we found that whether the sovereignty was or was not above the law a chancellor is a minister of justice. In Pennsylvania we bow to a chancellor, but we uphold the common law. Although we administer equity through common-law forms and thus are sagacious and merciful, yet whilst we are acting under the common law we will not find facts; we instruct the jury as to the equities; in procedure which has not the form of an action at common law we

go to a chancellor, that he may exercise the ancient function of the ecclesiastics and do what it is ever impossible to any common-law judge to do.

Thus you see facts are found in the administration of justice by a body of men who are not judges at common law and who may find upon presumptions, which may be another way of saying that they may find without proof, and from this has arisen the apprehension as to the general verdict which is thought to be a menace because it is the juridical duty of a court to enter judgment upon it and not upon the facts. In this way it is conceivable that a judgment that A. is in default is wrong, because according to the facts A. is not in default, but not the less it must be held right because upon a regular and irreversible verdict.

The consideration that, in a way a jury sometimes also passes upon the law, heightens the effect of what we have disclosed, and the result as it might be stated by a disaffected critic, and as it has been stated by many, is that the community, through its unprofessional representatives, disposes of property, adjudges answerability in money, pronounces against integrity and honor, dooms to imprisonment, outside of the reach of the law, and with such recognition only of the law as is involved in taking an oath to well and truly try an issue according to the evidence and in listening with respect to judicial instructions as the inquiry proceeds. This criticism comes from the losing party, who is sure that he was in the right; often from the winning party in order to glorify himself in winning against odds; it comes thus as of course; moreover it comes from the philosophic and well-furnished observer who has nothing at stake. If you pause at this moment to appreciate the breadth of the description I have given, does it not come from you? The jury gives no reason in the general verdict. It is not answerable for a verdict which a court thinks wrong. It concludes everything in uttering but one word, plaintiff or defendant. This power is thought by many to be a menace.

I offer, as an illustration of my hints, the case of *William Hopkins* v. *Lazarus Tilman,* reported in the 25th of the Georgia Reports, p. 212.

Action for breach of warranty to August Term, 1858.

Hopkins sued Lazarus on the ground that he had failed to observe his contract which was in writing, the vital part of which was as follows: "Received December 31, 1853, of William Hopkins six hundred and fifty dollars in full payment for a negro woman named Catharine, about seventeen years old, whom I warrant to be sound in body and mind."

Hopkins demanded damages, as the negress had been unsound at the time of sale.

Walter Ector swore that the girl was healthy at thirteen. Dr. Reese swore that he thought she was malingering in the spring or summer of 1853 or 1854; he apparently could not tell which. Dr. Hood testified that he saw her in the spring of 1854, and that he had no doubt she then had a fit. Milton Hopkins testified that she had a fit about February 1, 1854, and since that time she had had four other fits—had had about two fits every month; her fits were gradually growing worse, were severe, and her mind was impaired. Zimmerman Hopkins corroborated this. William Hood swore that he saw her in a fit in May, 1854. Plaintiff tendered a return of the negro at the end of May, 1854.

You exclude the testimony of Ector and Reese as, one irrelevant as not followed up; the other incompetent. You must accept the deduction that, after the end of May, 1854, the negro did not get well, as otherwise the fact would have been shown. You have then only to consider whether the deduction that she was sound on the last of the year 1853, although one month later and continuously since she was not, was justifiable upon the proofs. The jury found that she was. How could you review this general verdict? Observe: there was no evidence that the negro Catharine of about seventeen years of age had been sound at any time after thirteen. There was the necessary implication that she was unsound from some time in February, 1854, continuously. There was the proof by witnesses that she had fits just a month after the warranty, growing more frequent and more serious up to the time of return tendered.

How could the plaintiff under the circumstances, for we must respect the circumstances, have more clearly shown the unsoundness? And do you think that if the jury had been confined to a special verdict the finding would have been the

same? Could they have found that this radical defect had arisen between December 31, 1853, and February 1, 1854? had developed to this acute stage in thirty days? The Appellate Court declined to reverse the judgment. There was a like case in our state, arising forty-five years earlier, where a note was given for a negro boy sold for a term of years, and the jury found the boy unsound upon presumptions drawn from like evidence: *McDowell* v. *Burd,* 6 *Binn.* 198. These are notable precedents, and in the line of scientific or juridical propriety, and yet it must be allowed that *Hopkins* v. *Tilman* illustrates the menace that lies in the general verdict and should not be followed, as it is not followed, in actions of tort of the present time, especially in those which lie for injuries to the person, wherein are two grave dangers, the danger of a jury in a general verdict acting upon prejudice against corporations, and the danger even in the case of a proper verdict, of a jury's assessing the damages in excess of the due measure. Surely, it appears often that the revision of a general verdict as against the weight of the evidence is incumbent upon the court.

III.

Personal Justice.

And this just sense of right it is that in its exercise has disclosed the third menace to which I have referred, the menace of personal justice. This menace must arise where we do not take special verdicts. The revision may sometimes be influenced by a sense that the verdict, in affecting the individual alone, works an intolerable injustice—not merely an injustice, but an injustice that is intolerable. This is the sense of one trained jurist, or of one and a few associates: how can his sense or their sense find a thing intolerable against the sense of twelve men who are the established arbiters in the matter? and who by the theory of our law are the people, called the country, to whose arbitrament the dispute has been disclosed by the joint action of the parties. And if it is allowed that this may be so, will the course end in the subversion of the jury?

The famous judgment of Vaughan, C. J., on this subject

is powerful. *Bushell's case. Vaughan* 135-6. The last deliberate consideration of it has been by distinguished jurists in this State, one of whom says, "It is not without the greatest apprehension that I see this wide departure from the settled law of this Commonwealth; it seems to me it must end in jury trial rapidly falling into disuse; there will then be eliminated from our judicial system one of the chief elements of our strength, and one which has always had the earnest support and warm attachment of the citizen. Although there is some exaggeration there is much truth in the declaration of the Englishman that, 'The whole establishment of King, Lords and Commons, and all the laws and statutes of the realm, have only one great object, and that is to bring twelve men into a jury box.' (*Smith* v. *Times Pub. Co.*, 178 Pa. 530.)

The spirit of our legislature has been assumed to favor a restriction of the power of the jury to find a general verdict in cases where in the judgment of an appellate court personal injustice not to be tolerated ensues upon a disregard of the weight of the evidence, and I will cite a statute which is said to be confirmatory of this, although I must add that I do not think it is to be feared, because it is unlikely that the suggested legislative attack upon the jury will be effective in courts of review. Yet not the less it may by some be regarded as an element of this third menace.

The statute was approved May 20, 1891, P. L. 91, 101. The second section is as follows: "The Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment order or decree appealed from, and to enter such judgment order or decree in the case as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had."

It has not been doubted that the only passage to which one may give attention is this, "and may order a verdict and judgment to be set aside and a new trial had;" and I myself have little doubt that this passage merely expressed the law as it then stood. You may find in our books a precedent for the Supreme Court's order that a new trial be had under

all circumstances within our Constitution. That it may so order for error in law is the reason of its existence; that it may so order because a verdict imposes excessive damages has been shown in early cases, one of which is interesting because the Chief Justice in 1802 declared that a new trial must be had, as the result under review was "against justice" —a distinction looking at the menace I am now discussing, for he did not find it against law. *Woods* v. *Ingersoll,* 1 Binn. 149. And I think you can find a case in which it has thus proceeded on the ground that the verdict was against the weight of the evidence. In *Lessee, etc.,* v. *Cochran,* 1 Binn. 231, there was reviewed the action of a Justice at Circuit who does not appear to have sat *in banc* when the weight of the evidence was discussed, and Brackenridge, J., said that "the court might order a new trial where the jury had found clearly against the evidence." So also said Duncan, J., in *Sommer* v. *Wilt,* 4 S. & R. 26. These three were cases, however, at the argument of which in error the trial judges were presumed (and in two instances the report shows) to be present. It is true that in the last fifty years that court has left the question of the allowance of damage to the court below, and the *R. R.* v. *Spicker,* 105 Pa. St. 142, is an apt illustration; and that in the last seventy-five years it has refused to discuss the weight of the evidence, illustrations of which are too numerous to be here cited. It has relied upon the finding of the jury as conclusive when approved by the trial court. Now, how has the Act of 1891 reached this state of things? Has it conferred power? The question does not appear to be worth discussion. If it has conferred power it can only be with respect to a reversal of a verdict as against the weight of the evidence, with respect to this exclusively; and in such cases you must ask if it is unconstitutional. I shall say a few words on this head. Is it unconstitutional as impairing "trial by jury as heretofore"?

I would prefer to enforce briefly an unfriendly criticism of this statute by a process that sets out from a principle of law. The truth as shown by witnesses is not educed from the testimony in chief, but largely from that and the cross-examination together. Nor is it alone from these two that

it is derived. The object of legitimate cross-examination is to test the credibility of a witness, and it is always to show that what he has said in chief is not credible, is either wholly incredible, or must be taken after allowance made for certain things which it has not brought to light, and which are brought to light by the adverse inquisition. Unless an advocate has this object he does not cross-examine, or is an unskilled advocate if he does. It is an elementary sneer that an examiner has only accredited the testimony which he meant to discredit. Now, the value of cross-examination does not lie alone in question and answer: it lies largely, and often almost entirely, in the manner it discloses. The principle of law I refer to is, that to the jury must be left the question of the credibility of a witness. Therefore the jury may wholly disregard answers making one way, if they conclude, from the manner of delivery, that they are not to be believed, and that, in truth, the fact was the other way, or never arose as a fact at all. This function, according to Pollock and Maitland, was an *ancient element* of the verdict, and was what Bracton meant in speaking of the *judgment* of the jury. *Hist. of Common Law,* II, 625. Thus, you see, a new trial on the ground that the verdict is against the weight of the evidence means that the jury have misjudged the substance of things spoken and the manner of the speakers. It must mean this. And it must mean, therefore, that a reviewing power having before it both of these things—that is to say, *what* was said, and *how* it was said, and giving due effect to both, alone can validly discard a verdict. Such a reviewing power is obviously the trial judge: and his discretion must be exercised with circumspection. He rarely sits alone, but has his colleagues as assessors upon questions of law. Justice Yeates thus regarded the situation in *Comm.* v. *Shepherd,* 6 Binn. 288. His reversal of a verdict means that, finding the tenor of the open and clear run of the oral proof to be against the decision of the jury, *he finds also that there was nothing in the manner of the delivery as he had it before him, just as it was before them at the trial,* to justify in law, under their oaths, a decision upon the *manner,* that this run of oral proof was incredible. The manner is as important a factor as the words in respect to

the credibility of witnesses. If this is so, can an appellate court, to which the record carries the words only, decide, in the absence of the other factor, that things said must be taken as true even against the jury who did not credit them because the circumstances of their saying had shown them false? If this is so, no appellate court is bound by a verdict. "And thus," in the language of Eunomus, "may the Constitution suffer by dropping a jury." Wynne II, 133.

Professor Thayer has said, "This institution, the jury," . . . "has a peculiar interest for us, in the United States, in being lodged beyond the reach of ordinary legislation in our national and state constitutions." By the light of our constitutional provision that trial by jury shall remain as heretofore, we need not fear that the Act of 1891 will be held to warrant an appellate estimate of, and judgment upon, the weight of the evidence, in a tribunal without means of appreciating the foundation of a jury's judgment of credibility.

In this relation I refer to the case of *Smith* v. *The Times Pub. Co.,* 178 Pa. St. Reps. 481. We are in the way of hearing of cases which are of vital importance in the advance of jurisprudence, no matter how slight their effect upon the persons immediately involved, and I could name several in the history of our court of last resort, but I do not find it expedient in illustration of my subject to go beyond one of them. *Carrol* v. *The R. R. Co.,* 2 Pennypacker, 159, may be pointed at as the most recent of this class, and perhaps, the most important in the list, and as in the line of that one which I propose to dwell on; but I must pass it for the present. On the point referred to that case is a precedent. *Smith* v. *The Times Pub. Co.* is also, as of course, a precedent, and on the points decided is supported by the authorities in England and by a line of precedents among ourselves. I speak of this case because of its *dicta.* It is of great value to the modern student because of its *dicta,* and as to these it may perhaps be thought that they preponderate in favor of the doctrine of personal justice, to be administered in cases where the general verdict is disapproved by an appellate court, that court being influenced by a sense that the verdict, in affecting the individual alone, works an intolerable injus-

tice—not merely an injustice, but an injustice that is intolerable, and that it is likely would not have been incurred had a special verdict been directed.

I shall refer only briefly to this case, and for the sole purpose of suggesting a line of investigation. The plaintiff charged the defendant with the publication of a libel, and the jury found for him and assessed the damages in an amount so large as to have imposed, if finally sanctioned, an intolerable injustice upon the defendant alone, which the trial judge and his associates *in banc* did sanction upon their review on rule for new trial. The record carried to the Supreme Court exhibited the testimony and papers offered, and one bill of exceptions to a statement of the trial judge, but it did not carry up the charge; so that, apart from the bill sealed to the statement referred to, there was for examination only the amount of the verdict in its relation to the entire volume of proof. The Supreme Court held in effect that, every intendment favorable to the plaintiff being allowed from the entire volume of proof, there was no warrant for the finding of the amount, and it awarded a *venire de novo,* expressly upon the ground that the finding was excessive.

But that court invoked the Act of 1891 as authority for the procedure, and there arose a discussion of the constitutionality of that act, and a consideration of the danger of entering upon the province of the jury. The danger contemplated was, that a general verdict, when found bad by an appellate court, might lead to the graver peril of the administration of personal justice, of a remedy due to the hard case in hand, and thus might be subverted in degree the privileges and authority of the jury by the exercise of an arbitrary power to remedy a jury's mistakes. Did the act modify trial by jury as established at the adopting of the Constitution?

It was the opinion of the court that it did not, because trial by jury remained precisely as at the time of the adoption of the Constitution, and therefore as heretofore. Said the court, "All the authorities agree that the substantial features which are to be 'as heretofere,' are the number twelve, and the unanimity of the verdict. These cannot be altered, and the uniform result of the very numerous cases

growing out of legislative attempts to make juries of less number, or to authorize less than the whole to render a verdict, is that as to all matters which were the subject of jury trials at the date of the Constitution, the right which is to remain inviolate is to a jury 'as heretofore' of twelve men who shall render a unanimous verdict. Matters not at that time entitled to jury trial, and matters arising under subsequent statutes prescribing a different proceeding, are not included. 'The constitutional provisions do not extend the right, they only secure it in cases in which it was a matter of right before. But in doing this they preserve the historical jury of twelve men, with all its incidents.' Cooley Const. Limitations, 504 (Ed. 1890), and see Black on Const. Law, 451, and cases there cited." . . . "The Act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between the verdict and final judgment, of exactly the same nature and the same effect as the long-established power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result not merely legal, but also not manifestly against justice, a power exercised in pursuance of a sound judicial discretion without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly. It has never been thought to be confined to the judge who heard and saw the witnesses, but belongs to the full court *in banc,* and was freely exercised by this court when the judges sat separately for jury trials. See for example, *Sommer* v. *Wilt,* 4 S. & R. 19."

You will observe that the salient points here suggested are: that the substantial features which are to be as heretofore are the number twelve and the unanimity of the verdict; that the Act of 1891 only provides for another step between the verdict and the judgment. that is, a review in an appel-

late court of the same effect as that in the court a member of which tried the case; that the authority of the court a member of which tried the case to review a verdict as excessive has always existed unchallenged; that this authority "has never been thought to be confined to the judge who heard and saw the witnesses, but belonged to the full court *in banc.*"

In this relation I have concluded to suggest to you these propositions for investigation, each one of which may be tested by the authorities.

I. Is the Act of 1891 idle, as a mere statement of subsisting judicial power? If it is not, it must be concluded that it has relation only to verdicts against the weight of the evidence, inasmuch as the authorities have universally sustained the appellate action of a superior court in other directions.

II. Are the number twelve and the unanimity of finding the only indestructible characteristics of a jury? If so, the inquiry may close here. If not, then you are to consider that the investigation proceeds only with relation to questions of the weight of evidence.

III. Is there a difference of function involved between setting aside a verdict as excessive and setting aside a verdict as against the weight of the evidence? My suggestion in the course of this paper has been that there is such a difference of function. Where a verdict is excessive the error lies in the misapplication to facts found by a jury of a rule of law as to the measure of damages.

IV. Do the precedents, dating from the abolition of the attaint of the jury, warrant the action of an appellate court of which the trial judge is not a member in setting aside a verdict? In this relation we must disregard the English precedents which are not subject to any restrictive constitutional limitations, and the precedents in our earlier reports in which the Supreme Court reviewed cases tried by one of its own justices, either in circuit or at *nisi prius*. The reason for this is that by the theory of the law the trial judge always sits with the court *in banc* upon the review of verdicts complained of.

V. Assuming that in Pennsylvania the precedents at com-

mon law are against the action of an appellate court of which the trial judge is not a member in setting aside a verdict as against the weight of the evidence, may an act of the General Assembly create and confer such power within the purview of the limitations of the State Constitution? May it enact, in effect, that the presumptions of credibility and weight of evidence drawn by a jury may be set aside by a stranger tribunal?

VI. Is a statute constitutional which declares that an appellate court must (not may, but must) enter judgment upon the facts as it finds them, and not upon the verdict of a jury to whom both parties have submitted themselves for the finding of the facts? This is too serious a question to be lightly passed over. If it is answered in the affirmative, it may be apprehended that the principle which Burke correctly expressed some time ago no longer prevails, and that the peculiar feature of the law which has indicated safety and health to the community at large is no longer to be discerned in our jurisprudence. You will observe that in *Nugent* v. *Traction Co.*, 183 Pa. St. 142, the final judgment was for the defendant as on a demurrer to evidence. The court did not find the facts. "We apply," said the court, "the correct rule of law to the established facts of the case." The correction of a jury in matters of fact by a court, and not by another jury, is contrary to a long-established principle. "If," says Eunomus, "they judge apparently wrong, that judgment of theirs may be corrected, but it will still be by another jury; so that the injured party will not suffer for their wrong judgment, as they might sometimes have done in the perilous days of attaint, nor will the Constitution *suffer* by dropping a jury." Wynne II, 133. And see II, 140, 3d edit.

VII. Could an act of Assembly prescribe that hereafter juries were prohibited from drawing presumptions from facts and regarding suspicions as to credibility, but must find according to words spoken and the direct tenor of the other proofs, whilst an appellate court *might thus find and also must as its exclusive function judge of the credibility of the witnesses and draw deductions from evidence?*

VIII. Does the Act of 1891 require the Supreme Court upon record duly brought up to grant a new trial even where

a motion was not made for reasons filed according to rule in the court below? This is not an idle question, and its affirmation would seem to follow upon a conclusion resulting from your determination that the Act of 1891 affects questions of weight of evidence, and thus affecting them is constitutional.

These are questions of deep import, and they are not upon a technical branch of the law; they are questions for a statesman, having relation to the structure and life of the system of jurisprudence itself and arising with significance of danger in the future. They might have been the basis of one of the profoundest arguments of Burke, and they may well induce the writing of a great law book to-day. There is as ready and promising an opportunity here as there was for the work of Fearne, which did so much to guard against error in the disposition of estates, which indeed established the current of authority for years; and the scope of the topic is greater here because not only estates, but liberty, reputation, commercial advance, may be found involved. There should be a quickening of the professional conscience as to the jury as an institution, and an awakened interest in the very searching learning upon the subject. More than this, there should be an influence opposing the trend of American legislation against the organic law. For the creation of such influence the young men of the day should by steady investigation in their leisure hours, and careful thought, produce a sphere, an atmosphere as some might call it, of culture, in which high tone is nurtured and invigorated, and in which only may the real import and essential value, the essential necessity, of our institutions be seen. I venture to recommend to you four authors and some of the innumerable works which their citations recommend to you, in this behalf: Francis Lieber, in his chapter, *Independence of the Jus:—Trial by Jury*, to be found in his *Civil Liberty and Self-Government;*—Hegel, in his section of *The Civic Community; of the Court;* in his *Philosophy of Right;* — Sir Francis Palgrave in his *History of Trial by Jury*, an authority of some age now;—and Professor Thayer in his *Development of Trial by Jury*, the latest great authority. The opinion of the Supreme Court of the

United States, by Justice Gray, in *Capital Traction Co.* v. *Hof.* 174, U. S. S. C. 1, is valuable.

Are you aware of the extreme to which some of the new states have gone in subverting the jury of the ancient time? And, on the other hand, of the show of fear of the judiciary as a menace to the jury which two or more of the older states make? The contest lies between the sovereignty and the governed, and in one form or another is as old as government itself. The most interesting, because the farthest reaching exhibition of it, lies in the old English Statutes of Liveries and of Laborers. When the King found the people dangerous he sided with the nobles in the Statutes of Laborers; —King and Lord against servitor and plebs; when he observed the nobles too powerful, he sided with the commons in the Statutes of Liveries;—King and plebs against Barons, Earls, Dukes. When the pervading power with us has one blind fear it strikes at the jury and enlarges judicial reach; when the nightmare incantation stirs another blind fear, the pervading power attacks the judges and puts the jury above them. For illustration of this second form of panic, let me refer you to the Dumb Act of Georgia of fifty years ago. It was enacted on the 21st of February, 1850, and prescribed in substance that a trial judge should not charge the jury as to what had or had not been shown by the evidence, or express an opinion as to the guilt or innocence of one accused, and that if he did, his language, however accurate, should constitute reversible error. This, according to the witticism of Chief Justice Bleckley, struck the judges dumb. They became so anxious not to have an opinion on the facts, and law and fact are usually so intermingled in instructions, that they frequently failed even to express an opinion on the law. (See *Am. Law Rev.*, Sept.-Oct., 1900.)

The illustrations of attacks upon the jury are so numerous as to justify a strong word. In Louisiana, except in cases where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly may provide for the trial by a jury less than twelve in number, and by the Act of 1880 nine out of twelve jurors may render a valid verdict in civil cases. In Iowa the General Assembly may authorize trial by a jury of less number than twelve men in inferior

courts. The three-fourths rule prevails in Nevada, South Dakota, Texas and Washington. Two-thirds may render a verdict in Montana in all civil actions and in all criminal cases not amounting to felony, whilst in Idaho in all cases of misdemeanor five-sixths of the jury may render a verdict. In Utah the trial of a felony less than murder by a jury of eight men is legal under the Constitution.

It is interesting to consider that if we take the description of these three menaces to modern jurisprudence in its darkest import, we yet preserve our content. When we appreciate the truths, that pleading is beyond the sphere of the Law; that the finding of facts is no part of the Law; that personal justice is abhorrent to the Law, we go far towards so true and profound a conception of the Law as very few men have analyzed, and as makes us know Right itself, the real Jus that great scholars of Pennsylvania like Brinton Coxe, James Parsons, John Cadwalader and William Tilghman have always held in view. The General Issue sheds its genial influence upon Retort, and requires judges who are too busy for the labor to act as moderators in a debating society whilst a jury idly watches (see *Reeves' Hist. of English Law,* II, 219, *Finlason,* 1869); but this evil was felt at the beginning of the century in this Commonwealth, and whilst much remains to be improved, not the less by our system of affidavit of defence, which is untechnical special pleading, and of notice of special matter, there is a good degree of preparation for proofs before the trial court convenes. We should make the affidavit of defence a plea and by process of demurrer prune it from Retort to Answer. The General Verdict is without scientific sanction in many instances, but it is much less dangerous than it was in the time of Edward the First before Parliament by the Act of the thirteenth of his reign prohibited the justices from compelling jurors to find a general verdict involving a question of law, and declared that, should the jurors have the temerity thus to do of their own motion, they were to be regarded as acting at their own peril. It is safer, perhaps, as more free from one kind of interference than it was in the day of Shelley, J., who charged the jury as to credibility and weight of the evidence, *int. al.,* that men are liars and not angels:

homines sunt mendaces at non angeli. Rolfe v. *Hampden, Dyer,* 53.b. And although to-day it must be conceded that by it some loss at times is entailed upon corporations defendant in actions of tort, their gain by the doctrine of contributory negligence is at other times perhaps more than the strictest justice would allow them, and certainly a compensatory circumstance.

The prerogative to direct a special verdict has not often of late been exercised here, but in actions *ex contractu* it may in its exercise go far towards the restoration of the balance of power between the jury and the judge, although we must not forget the warning of Brackenridge, Justice, in *Wilt* v. *Franklin,* 1 Binn. 528, that on a special verdict the presumptions and inferences must be drawn by the court. Always, however, does this caution present itself to us, and particularly in the sphere of the recognition of personal justice, or the justice of hard cases, when the institution of the jury may at times appear to be slighted. But there is never a time when menaces may not be pointed at and feared by certain observers. And as these three menaces of to-day are found in branches or accessories, and not in the great system or trunk itself, we need only say that at the worst some exuberant overgrowth must be lopped off. My intention has been to describe them as fully as may be, in order to show you two things, that the science of law in its administration is not in danger, no matter how strong certain evidences of development which the superficial call innovation, reform, subversion; and that learning has been, is and always will be the light and help of the law; and that above all the Jus or Right itself remains unaffected. Learning tempers criticism, takes the tone of melancholy out of complaint, ends individual arrogance, alone makes for universal right. Learning in its fullness goes far beyond the stage of complacent disapproval which is a sure sign of weakness. Remember the great protest of Ben Jonson in his preface to the *Alchemist,* and how he closes: "For it is only the disease of the unskillful to think rude things greater than polished, and scattered more numerous than composed." Suppress every sneer to which your academic success may tempt you, for you cannot, if a good scholar, find any feeble proposition without

warrant in some record. That a judgment must not precede proof is probably the surest affirmation I can recall to you; you might think you could claim toleration for a sneer at its converse; and yet in the Anglo-Saxon procedure a judgment was rendered before the evidence was taken and conclusion of fact found, a practice not only finding warrant in a record, but warrant in a system of judicature.

Ignorant men may sometimes help you. It is always dangerous, at any rate, to contemn them. But this is because they put you upon inquiry and thus incite you to delightful and more careful investigation. It is never to be reasonably feared that the practice of the law will become vicious, or even bad, or even hurtful, through ignorance. In the very nature of the thing the practice cannot be radically wrong. There may be seasons of decadence. But the use of the intellect with a view to persuading or convincing a court, and subject not only to the correction of an adversary, but to the rulings shown by volumes of reports and prescriptions of statutes which must be obeyed, makes in practice an effective intellectual vice impossible.

William W. Wiltbank.

NOTE.—*The view expressed in this paper that "the achievement of a surrejoinder has for years been absolutely impossible" is not affected by the recent report of Allen* v. *The Colliery Engineers' Co.,* 196 *Pa. St. R.* 512, *in which a series of papers appears to have been filed in the court below entitled as pleadings up to a demurrer to a surrebutter.*